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Mining Conflicts and Corporate Social Responsibility in Kenya's Nascent Mining Industry: A Call for Legislation

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Abstract

Much of the debate in Africa with regard to mining has been on the question on whether or not mining is good for development. While some scholars agree that mining is indeed good for development, others have argued that the structural constraints found in many developing nations render mining almost untenable. Corporate social responsibility (CSR) has been suggested as one of the ways through which the difficulties associated with mining can be ameliorated. However, CSR activities in developing countries, especially in Africa, have had a questionable reputation. Many view the few programs rolled out under this program as having done little in meeting the needs of the affected mining communities. CSR in Kenya's mining industry has, on its part, received very little attention. This work reviews mining conflicts in Africa and examines how CSR can assuage mining community disaffection over mining projects.

Keywords: corporate social responsibility, mining conflicts, Kenya's mining industry, structural constraints

1. Introduction

The rapid reform of the developing world's mining economy has led to a host of social problems, none more serious than community dislocation ([1], p. 99). It is argued that involuntary population displacement and resettlement is "one of the major social pathologies" that inevitably results from numerous development projects ([2], p. 263). Structural constraints are exemplified by the displacements, which refer to "both the physical removal of people from their homes and restrictions on their resource use and access to places, which prevents them from pursuing their livelihoods [2]."

The 1980s is described as the “decade of displacement” ([3], p. 2183). This period witnessed the largest number of people displaced by development projects, whether through mining or through construction of large dams. In developing countries, the scale of population displacement has grown rapidly over the past decade due to compelling need for development projects [4]. The following data demonstrates the magnitude of mining-induced displacement: in Indonesia, 15,000 people were displaced in the Freeport Mine; between 20,000 and 30,000 were displaced in the Ghanaian Tarkwa Mine; over 37,000 people were displaced between 1996 and 2001 in Southern Africa; in South America, 25,000–35,000 people were forcefully relocated in the Tucuruí hydropower complex in Brazil, which was to be used to support a nearby mining operation. Other cases of mining-induced displacement and resettlement are visible in Papua New Guinea, Indonesia, the Philippines, Peru, Venezuela, Suriname, Guyana, Argentina, Chile, Honduras, Tanzania, Botswana, and Namibia [4]. Kenya can now also be added to the map of Mining-induced development resettlement (MIDR) as populations have been displaced in the titanium mining project in Kwale and in the Fluorspar mining project in Kerio Valley. The World Bank and the African Development Bank (AfDB) policies provide standards for involuntary resettlement programs by recommending some minimum requirements that have to be met, such as the provision of housing facilities, water supply systems, schools, and healthcare facilities among others, at the host site for use by the displaced persons. Another benchmark used by governments and extractive companies for purposes of guiding involuntary resettlement is the “Equator Principles.” This is a financial industry benchmark for determining, assessing and managing social and environmental risk in project financing. Members of this Institution (the Equator Principle Financial Institute), offer development loans only to institutions and/or governments that comply with the nine Equator Principles.¹

The problem with mining-induced displacement and resettlement (MIDR) is that it poses a major risk to societal sustainability, and according to the World Bank’s Operational Policy 4.12 of 2001 if these risks are not mitigated, involuntary resettlement projects would give rise to severe economic, social and environmental problems [5]. Social displacement in Kenya in the post-colonial era (that is, after 1963) has been in relation to several projects, notably the Kiambere Hydro Power Project, the Third Nairobi Water Supply Project, the Lake Bogoria Game Reserve, the Sondu Miriu Hydro Power Project, the Turkwel Gorge hydro-power project and the Kwale Mineral Sands (titanium) Mining Project. Of the six, Kwale’s displacement bears the distinction of being the first post-colonial anti-commons (large scale displacement event) act in the mining sector for solid minerals. Due to its symbolic nature, mining breeds more intense conflict than in the other instances of displacement. It is for this reason that social provisioning to aid the displaced persons becomes very critical. Corporate social responsibility (CSR) has been suggested as one way through which conflict between the local community on one hand and the extractive company/government on can be minimized. Let us examine the nature of the mining-induced conflict in the African continent.

¹See EPFI, June 2013 - www.equator-principles.com/about [Accessed: March 17, 2018].

2. Mining conflicts in Africa and some other developing countries

Mining is one of Africa's most important industries, as it contributes significantly toward local employment, foreign exchange earnings and national Gross Domestic Product (GDP). Africa hosts 30% of the earth's mineral reserves, including 40% of gold, 60% of cobalt, and 70% of platinum deposits, and produce about 30% of the world's gold, 70% of the world's platinum, 28% of the world's palladium, and 16% of the world's bauxite. Africa also produces (yearly, in thousand metric tons) 205,056 of hard coal, 67,308 of nickel-bearing ores, and 29,174 of iron-bearing ores, as well as 595,507 kg of gold-bearing ores. Small-scale mining has also played a crucial role in mineral wealth generation in Africa, and was a source of wealth for many empires and kingdoms before, during, and after the colonial period. It is estimated that in recent times, small-scale mines produced gold and gemstones valued at a combined worth of U.S \$1 billion annually [5]. Without a doubt, therefore, mining has been and continues to be of great economic significance to the economies of many African countries.

Mining presents communities with opportunities for social and economic development through positive impacts such as increased access to jobs, healthcare, education, and sanitation. However, at the same time, it can also result in devastating impacts on human health, local systems, social structures, production systems, cultural traditions, physical displacement, demographic shifts, and dependency ([6], p. 153). Mineral extraction has long been accompanied by social protest—some of these protests have been against social dislocation ([6], p. 431). However, much of the mining projects are fraught with conflict over various issues, such as conflict over land ownership, conflict over compensation of lost assets, conflict related to environmental degradation, conflict over sharing of mining benefits and lastly, conflict over abuse of human rights (in the process of mining activities).

Examples of such conflict are many, and several reasons have been advanced as to the causes for these conflicts and are based on structural controls of different governments. In Nigeria's Niger Delta, the local communities have been embroiled in conflict with the extractive companies (particularly Shell and Chevron) and with the Nigerian government ever since the first commercial drilling of oil begun in Oloibiri in 1956 [7–10]. It is argued that the question of land ownership is what underpins much of the conflict witnessed in the Niger Delta [11]. Research among some rural communities in Rivers, Bayelsa, and Akwa Ibom States in Nigeria's Niger-Delta region, noted the disdain with which the locals held the Land Use Act (which allowed land expropriation by the state), and the 1969 Petroleum Act (which vests all petroleum resource rights to the federal government), which clashed with the traditional thinking of the locals who exercised allodial interest on land, as occupants and users of the land, and therefore, considered themselves the real owners of the land [11]. The locals insisted that they not only own the surface rights, but that also owned the subterranean rights as well. Environmental degradation is also offered as another reason for these conflicts. When one looks at how 80 years of commercial mining of tin has left a legacy of damaged or derelict landscape covering some 316 square kilometers in Jos Plateau in Northern Nigeria, and how efforts at reclamation have largely failed, one can understand why mining is abhorred ([12], pp. 48–49). Clearly, environmental concerns are a major issue in mining conflicts, even more so when the

damage is as glaring and/or as dangerous as that currently witnessed in the Niger Delta (where environmental damage is caused by gas flaring, tailings, and oil spills) ([11], pp. 28–29). Other scholars have argued that mining conflicts are caused not so much by environmental degradation as literature suggests, but by the unequal distribution of outcomes arising from environmental degradation and the process that causes it, or from the profits emanating from such activities ([13], p. 5; [14]). Locals are often quoted lamenting that “what we have here is a situation in which the states producing the oil wealth go cap-in-hand and the non-producing *far-flung* states enjoy the wealth ([14], p. 770).” It is argued that oil extraction and distribution of the benefits, as well as oil revenue politics, informs most contemporary conflicts in Nigeria’s Niger Delta [9, 10]. It is noted that whereas much of the oil revenue is derived from this region, it remains one of the poorest regions in Nigeria. Although oil is primarily pumped from this region, and that this dominates Nigeria’s foreign exchange earnings, the “oil minorities” receive few of its benefits; rather, “the central government distributes most of these earnings to more politically powerful regions particularly the North, leaving the Delta one of the poorest and most backward regions despite its being the primary source of Nigeria’s wealth ([9], p. 395).” This has spurred unrest in the Delta, leading to violence, acts of sabotage and to the kidnapping of government and oil-company officials.

Land ownership is also central to the conflict in Prestea, Ghana, where the indigenous *galamsey* (local term given to “illegal” artisan miners) mining group are in conflict with Bogoso Gold Limited (BGL—the property of the Canadian-listed multinational Gold Star Resources) over mining concessions [15]. Whereas the extractive company claimed that they had exclusive rights to land, having secured the requisite permits and leases, the artisanal *galamsey* claimed that they had indigenous ties to the land and that the recent policies were therefore inappropriate. The government, on the other hand, argued through the power of eminent domain, it had the authority over all land in the country. It is evident from these structural constraints that conflict tends to arise because of the multi-tiered system of land rights that exists in most developing countries, especially those in sub-Saharan Africa. As Firmin-Sellers argues

Throughout Africa, property rights to land are fluid and insecure. Private property, state ownership, and communally defined rights coexist in an ever-changing mix. Definitions of communal tenure continually shift. The farmer who claims land rights under one property system can never be certain when (or if) others will challenge his claims; neither can he predict whose claims the local community or state will uphold ([16], p. 105).

Tension particularly picked up in June 2005 when, during a public demonstration against Bogoso Gold Limited (BGL) operations, the army opened fire on the crowd wounding seven locals. According to Bogoso Gold Limited, the locals were being unreasonable over claims over their ancestral land as they no longer have rights to the land, having legally leased this to the company. As one company official put it:

the main issue is...the mind-set of these people—the galamsey people—whatever the government has to do to change their mind-sets...unless that is done, and like I said, there should be some radical way of doing it...Prestea people think they are unique, they are in a different state, and they can make their own constitution ([16], p. 106).

This statement underpins how contentious land ownership is in much of Africa. Other scholars have also identified this as the dominant source of conflict in mining operations [15, 17, 18]. It would appear that it is when communities are on the verge of losing their land that they realize just how precious that piece of earth is to them, and it is possible that it is this realization that then triggers the conflict.

Examples are plenty on how mining has degraded the environment. One such example is how cyanide spills in developing countries have had a negative impact on the environment—at the end of which the author asks whether mining is sustainable ([19], p. 319). This question arises due to the non-renewable nature of mining, and for the observed impact that it has on the environment and on the health of the surrounding community. Another example is the titanium mining accident of October 8th, 2010 in Nampula, Mozambique. On this occasion, a containment wall around one of the settling ponds adjacent to the dredge mine ruptured, and a flood of water, sand, and clay swept through part of the village of Topuito, destroying or damaging 115 poor houses and leaving their inhabitants homeless [20]. Fortunately, this was not toxic waste. One wonders what would have happened had it been toxic waste. However, coming close to the disastrous October 4th, 2010 aluminum toxic waste sludge in Hungary, the incident in Mozambique was enough to worry the Minister of Mineral Resources to travel to the coastal district of Moma to meet officials of the Irish company Kenmare, which operates the mine. The foregoing reinforces the notion that lack of proper legal structures and practices, coupled with delays or absence of operational reforms in the mining sector (especially in developing countries) only serves to make matters worse in the mining industry. This is at times despite the fact that there are policies in place by the funding agencies that are meant to guide the mining process against such eventualities.

Environmental concerns were again the bone of contention in asbestos mining in Prieska, South Africa. It is argued that damage arising from asbestos mining, which resulted in three deadly diseases [21] (asbestosis, lung cancer, and mesothelioma), was the major focus of the conflict. The locals were compelled to sue the concerned mining company (Cape PLC, registered in UK) over the effects of asbestos. The interesting part was that they lodged the case in the UK. In 2003 they won the court “battle” (in the UK) [20]. This was a pointer and an indictment to local laws, especially those in Africa, as not being adequate enough to protect the right of its citizens against environmental malpractices by multinationals. Another conflict front is opening up in South Africa's Wild Coast, where the Pondo community is currently resisting plans to mine titanium on their ancestral land, a move they claim will threaten a pristine environmental paradise.

The failure of the Angolan state to redistribute the oil resources in any just way has also prompted local unrest. This was most pronounced in the Cabinda enclave, where most of the Angolan oil has been extracted to date. It is argued that grievance over state neglect and the prospect of huge oil revenues were undoubtedly the main factors in the armed conflict of the Cabinda separatist groups ([22], p. 592). The separatists made a dramatic public statement in early 2010 when they viciously attacked the Togolese football national team, who were on their way to the African Cup of Nations competition that was hosted by Angola. In one research, it is argued that “mineral-dependent states have significantly higher levels of

inequality than states with similar incomes: the more that states rely on mineral exports, the smaller the share of income that accrues to the poorest twenty percent of the population ([23], p. 377)." In other words, sharing of benefits accruing from mining operations is not equally shared, and this, therefore, brings about tension and conflict.

Oil conflict in Darfur region of western Sudan is another example of note. The Misseriyya and the Dinka Ngok have long had competing claims over cattle-grazing areas and water sources in this region but environmental degradation (resulting from oil explorations), climatic changes and government support of one militia group over another have exacerbated conflict over land and the sharing of oil revenues. The involvement of the government of Sudan in supporting the one local militia against the other has further complicated the conflict. While acknowledging the contribution of grievances associated with marginalization, indigenous land rights and the exploitation of mineral resources, the continuing impact on the region of the global war on terror, competing imperialisms and sub-imperialisms; the associated interests of multinational mining companies; environmental threats, the interests of international drug-traffickers and human rights abuses inflicted on the civilian populations in both Niger and Mali by the recently US-trained militaries, the ongoing Tuareg rebellions in Niger and Mali are also generally attributed to the Niger Tuareg's demands for a greater and more equitable share of the country's uranium revenues [24].

The feeling of not benefiting from the mining activities is often hinged on some feeling of "ownership," which in this case, is the feeling among the community that they are the "true" owners of the land (and the minerals) on which the mining process is taking place. This then gives them that natural tendency to expect returns from what is "theirs" [25]. The indigenous landowners in Fiji, for instance, believe that land ownership extends to everything below and above the area of land they own, and this includes the minerals found below and the sky above ([26], p. 116). It is this feeling of "ownership" that then leads to demands for a share of the accruing benefits.

The high-handedness of governments in dealing with mining protests is also cited as another reason that sparks conflict. For instance, the ugly reprisal by the Indonesian army against protesters in West Papua is suggested as the main reason why the mining conflict in West Papua has gone on for this long ([27], p. 159). In the initial stages, the indigenous peoples were only protesting against the pollution of the Ajwa River by the Grasberg mine, owned by Freeport McMoran of New Orleans ([27], p. 159). In late 1970s, the locals (the Amungme) rebelled and destroyed the pipeline carrying copper concentrate to the coast; this was followed by ugly reprisals by the Indonesian army that was characterized as particularly terrible ([27], p. 159). This sparked outrage among the local community that has persisted to date. In furtherance to their protest, the Amungme community lodged several class action suits in court. Reports document that the Amungme representative, Yosepha Alomang, was subjected to horrible detention conditions as a result of these court cases. This is reminiscent of how the Maasai in Kenya (as will be discussed later) have been brutalized by the police whenever they attempt to publicly protest against the Magadi Soda Ash mining project.

The Liphokojoe conflict is yet another example that is of interest. In the early 1960s, individual diggers came from South Africa and various parts of Lesotho to Kao in northeast Lesotho to

mine diamond deposits that had been discovered in that region. However, these deposits were later leased out to a multinational company. These individual diggers were subsequently evicted from these lands. They thereafter spent most of their time hiding in caves and running away from the police—this is why they called themselves Liphokojoe (jackals/foxes), while spending most of their time stealing unprocessed ore from the company. At some point, the Liphokojoe chased away the company employee and took over the mine. In 1970, they launched a full-scale revolt against the government, the police, and the company over the mine where they killed policemen, burnt down government facilities and chased away other foreign prospectors. Suffice to say, this was met with utmost brutality from the government and resentment against the mine continues to date [28].

What the foregoing discussion reveals is that there are many factors that breed conflict within mining projects, most of them are based on structural constraints, on systemic inequalities. These conflicts raise the question whether mining operations should be allowed to go on even in instances where it is obvious that it would have a deleterious effect on the local population. Some scholars certainly think that they should not proceed, and argues that:

Mining companies and governments have to realize that just as a mining deposit under New York City would certainly not mean that mining will go forward, the same may be true for other places as well. This is where environmental justice arguments may start to creep in, despite the geological determinism of mining in general ([29], p. 432).

3. Specific cases of mining conflicts in Kenya

Let us now turn our attention to Kenya, and examine the causes of conflict within mining enterprises in this East African state. In this discussion, we shall examine the Kwale titanium project and the Magadi soda ash project.

The impact of mining on the environment has been argued as one of the major factors that drive the Kwale titanium mining conflict [30]. The titanium minerals targeted for exploitation in this project have impurities of iron, thorium and uranium, and that in the absence of an effective environmental management plan (EMP), the effects of stockpiling radioactive wastes and other impurities could lead to environmental degradation in both the terrestrial and marine environment. Further, it is argued that the inadequate compensation offered has also caused much disaffection among the displaced community as it did not take into account family size and structure, family assets and the cost of relocation ([28], pp. 73–74).

The concerned company, however, argued in defense stating that the environmental concerns pointed out have been addressed via an Environmental Impact Assessment (EIA) carried out in 2000—and for which approval by the National Environmental Management Authority (NEMA—the government body charged with the responsibility of assessing projects that may have an impact on the environment), was obtained and a license issued in July, 2002. Thereafter, NEMA approved the project's Environmental Management Plan (EMP) in January, 2003. The host resettlement site was also subjected to an EIA exercise, whose mitigation plans were

approved in 2006. The company further argued that the project had taken note of the potential environmental impact resulting from radioactive waste, and it was for this reason that it undertook the EMP exercise for which approval was obtained. Furthermore, the EMP pointed out that only very low “unharmful” levels of radioactivity occur naturally in the sands of the Kwale deposit, and even then, an elaborate system under the EMP had been put in place to manage the radioactivity levels. As for the matter of lost arable land, the company maintained that the area cannot be classified as supporting luxuriant agriculture as claimed by those who oppose the project. At best, the company argued, in agricultural terms, it could only be described as marginal land with subsistence farming being the norm. Further, the company argued that access to the sea was not restricted as the mine was located 12 km inland and as such, the project does not encroach on the sea or fish landing points enjoyed by the community [31]. Critics of the project however counter that restriction arises as the residents had been relocated further inland, far away from the sea. As for the issue of compensation, the extractive company (Tiomin-Kenya) maintained that the rates had been mutually arrived at through joint consultation between the government, the residents, and the company through the District Resettlement and Compensation Committee [28].

A discussion on mining conflict in Kenya is incomplete without mention of the longest conflict in the history of mining in Kenya: the Magadi Soda-Ash Mining. This conflict dates back to 1904 when a mining lease for this project was issued by Sir Donald Stewart, then the British East African Commissioner for the British colonial government. Opposition to this mining project, which has been on-going since 1904, hinges on the manner in which agents of the East African syndicate, the company that was at that time granted a “research” license to prospect for minerals in the then Maasai Reserve, “fraudulently” acquired large tracts of Maasai land for the purpose of mining the naturally occurring trona at Lake Magadi, situated some 120 km south-west of the city of Nairobi [32].

Whereas the Maasai “agreement” of August 8th, 1904 only allowed for European settlement, a move that physically displaced them from the wider Maasai land and into northern and southern reserves created for their settlement, they were made to sign additional “agreements” on August 9th and 15th, 1904 in which they gave their “consent” for mining to take place at Lake Magadi. The 20-year lease (later revised to a 99-year lease on April 12th, 1911) gave “full and uninterrupted right...to dig, get win and carry away all soda and other deposits minerals or precious stones there found ([32], p. 142).”

This concession was unfair, given that they were granted on land reserved for dispossessed Maasai communities. It is argued that the first Maasai agreement of August 8th, 1904 had expressly stated that these reserves were not to suffer any further excision, except upon “express consent” by the affected community. A careful look at the handwritten original 1904 document shows that the so-called “consent” to vacate the land was inserted in the agreement after the Maasai representatives had “signed” (thumb print impressions were used as there were hardly any educated Maasai then) the agreement. A second agreement granting extended lease into more areas occupied by the Maasai in the designated reserves were “signed” in 1911 on four separate dates, on April 4th, 13th, 19th, and 26th, 1911. A case challenging this extension was lodged in 1954 but the Maasai lost on grounds that they had lodged their

complaint outside the stipulated legal statute of 6 years in terms of government notice of 1920. However, how many Maasai would have had access to this legal notice of 1920, let alone the fact that they would have been unable to read it in the unlikely event that they had possession of it? To further stress the illegality of the possession of the Maasai land, it is noted that Provincial Commissioner Sweatman had in 1933 asserted that the mining clause in the 1911 Maasai agreement did not apply to the Magadi area, and as such, the mining company had illegally been occupying the said mines at that juncture (since 1911) ([32], pp. 157–158).

Failing to obtain a favorable ruling in court, the Maasai were patiently waiting for the lease to expire in 2023 at which time they would ask the independent government to correct the ills perpetuated by the colonial government. However, to their surprise, the Kibaki government that assumed power in 2002 extended the lease in 2004 for another 33 years—this was done despite open protest from the Maasai. The resultant court case was thrown out on a technicality, and demonstrations thereafter met with brutal police force.

However, land was not the only grievance that the Maasai bore against the Magadi mining project. Once operations on the project commenced, the community complained over the chemical stench from operations at the lake, a stench that was said to result in human sickness and health hazards. They demanded, and to date continue to demand, payment of royalties that were promised under the 1904 and 1911 agreements, but which have never been honored. This caused one community leader to remark in the 1960s that:

for 50 years they have drained the life blood of the Masai¹³, and the Masai are now as dry as twigs... The Company had stolen Masai water... So where are all the profits of the company going? Into the pockets of Europeans ([32], p. 153).

The Maasai also protested against the high-handedness with which the previous colonial and successive Kenya post-independent governments treated them whenever they have attempted to hold peaceful demonstrations. It is reported that one of the most vocal opponents of the mining venture, a lawyer for the Maasai on the cases lodged against the post-independent government, was shot dead in 2005 in an alleged robbery outside his suburban house in Ngong, where nothing was stolen from him. The perpetrators of this crime have to date not been brought to justice. It is everyone's guess who could have been responsible for the murder —“those who did not wish to rock the Magadi boat because they were beneficiaries of the operation and had received kickbacks and shares ([32], p. 153).”

In view of the above conflicts, the government and the company need to take careful measures that would assuage the disaffection of the affected mining communities against the two mining projects. This where CSR comes in.

4. The place of corporate social responsibility (CSR) in the mining industry

The popularly used definition for Corporate Social Responsibility in literature is that adopted by the Commission of the European Communities (CEC), which defines it as a system

whereby companies integrate social and environmental concerns in their business operations and in their transaction with stakeholders on a voluntary basis ([33], p. 7). However, CSR activities in the mining industry have long had a questionable reputation for social responsibility, especially in developing countries ([34], p. 275). This is why, as illustrated in Carroll's CSR pyramid, companies view CSR activities as trailing in importance when compared with economic, legal and ethical responsibilities [35]. CSR programs have not been without their dissenters who offer counter-narratives about the effectiveness of the programs. For one, it is reported that local communities are usually discontented by the manner in which extractive companies design and carry out their programs as they are fond of employing the "top down" approach, which often alienates the local communities from these programs—this is despite enjoying the relative benefits that come with such programs [34]. Others point to the often observed disconnect between the social provisioning provided and the wealth that is mined. This imbalance often agitates local communities leading to instances of conflict [36]. Others point out that in some cases, the array of social provisioning pointed out in company newsletters are never translated on the ground [37]. It is because of the various negative effects that accompany mining activities, and the fact that companies benefit hugely from these mining projects, that local communities have developed a natural tendency to expect tangible projects and services from mine developers, as they (the mining companies) are the originators of these problems [25]. Many organizations are thus adopting corporate social responsibility (CSR) to enhance their competitiveness and gain company acceptance ([38], p. 33). CSR is largely used as a form of corporate self-regulation integrated into a business model. Some scholars have argued that profits, rather than community development, is what drives capital.

Most corporate entities are formed to undertake business activities with a view to making profit. In view of this, business enterprises have been criticized as being driven by motives that militate against concern for the common good. So it is sometimes argued that if business is to be allowed to get on with the production of wealth, it must be made, by a combination of law and public pressure, to discharge responsibilities that are additional to the maximization of profit (Atuguba and Dowuona-Hammond [39], p. 17).

In essence, their argument is that though CSR is a voluntary undertaking, laws are still needed to ensure that firms do implement programs that benefit the local communities. For the mining industry, social responsibility may have direct implications for bottom line profits as evidence shows that sincere, convivial relations between mining companies and local communities play a crucial role in the economic and competitive strength of a mine [40]. CSR is, therefore, critical in bridging the gap between company profits and community development.

5. A critical look at corporate social responsibility (CSR) in Kenya's mining section

Kenya has an embryonic mining industry. Indeed, of the 70 important minerals listed by the British Geological Survey (BGS), Kenya is only listed in six of these. However, Kenya is currently revamping its mining industry and with the discovery of titanium in early 2000 (comprising 14% of the world's total), of gold deposits in Trans Mara in 2011 (reserves

estimated to be between 40,000 ounces and 60,000 ounces), of oil in the northern parts of Kenya, and of coal in the Eastern and Coastal part of Kenya, of gas in the coastal part of Kenya, and having the largest deposits of gemstones in the world, the country will soon be in the big league when it comes to mining. The need for CSR in the mining sector in response to this emerging fortune and to the troubles that usually accompany such mining concerns is, therefore, necessary if the further conflict is to be avoided.

As evident in most countries, more and more business enterprises are now engaging in CSR activities. Business firms are now integrating business with social acceptability so as to maximize profits. In Kenya, manufacturing firms, banking firms, airlines, government parastatals² among others, are now engaging in CSR activities [38, 41–45]. The general conclusion that the various researchers have come up with is that these business firms engage in CSR chiefly to obtain the “social license” to operate—this will, in turn, assist them to generate more profits. In keeping with Carroll's CSR pyramid, economic benefits are what interests most corporations. Legal responsibilities come next, followed by ethical responsibilities and tailing companies concerns are philanthropic responsibilities [46]. CSR and the matter of corporate citizenship in the mining industry are important for a sustainable environment, are fast becoming everyday buzz words but lacking serious commitment of companies and governments. Despite this growing importance, there is very little research being done on corporate citizenship in Africa ([35], p. 1). This is even more evident in the mining sector in Africa. In Kenya, for instance, as highlighted above, most researches carried out have focused more on business enterprises—very few studies have been carried out on mining firms [47, 48].

CSR activities of Tata Chemicals Magadi (TCMLL—formerly Magadi Soda Company) in Magadi division, Kenya is among the few that have been carried out [48]. Magadi Soda Company (MSC) started its operations in Kenya in 1911, in what some have viewed as underhand tactics by the colonial government which led to the local Maasai community to lose its ancestral land [32]. TCMLL “remains the dominant social welfare provider in the region and the community has benefited from the company's benevolence through donations and philanthropy” ([48], p. 75). Others have however argued against this characterization, instead arguing that the Maasai have benefitted little from this mining concern. They point out that among the concerns of the Maasai are the continued denial of compensating them for the seized land, the environmental degradation that has taken place and the continued refusal to pay the community mining royalties as had previously been promised [32]. When approached in 2005 and asked for its response to Maasai demands for a share of royalties, the company is reported to have ironically replied that:

“We are not faced with a demand for a share of the royalties as such, there is no claim.... There are a number of people from time to time who present themselves as representing the Maasai on this issue, but they don't.”.... “these people (in reference now to those who had made representations to the UN Permanent Forum on Indigenous People on the matter of compensation and payment of royalties) are not part of the Magadi community and they don't” ([32], p. 155).

²These are government owned companies, boards or organizations which help the government to run some essential functions.

The downside with Muthuri's article (see [47]) is that although it sufficiently details the process of participation within TCMLL CSR program (as in the author's words, the company "goes beyond the 'affect-affected' binominal defining the management of corporate-stakeholder relationships and demonstrating how a company purposefully facilitates participatory network governance to tackle complex social issues in the local communities in which they operate") it does not include community sentiments over these CSR activities ([48], p. 83). Neither does it enumerate the activities mounted by TCMLL and indicate the degree of participation within the various programs. The various CSR activities can nonetheless be found on Magadi Soda Foundation's Website³. One notes from the website that the company has programs in health, education, environment, and youth empowerment. With regard to health, the company boasts of having constructed a 60-bed capacity hospital that is open to the local community and offers both outpatients and inpatients services. Through the Foundation, the company further subsidizes healthcare in the hospital to the local community for up to 70% of the cost of treatment. However, based on the arguments on the stench emanating from the plant and the health consequences that come with this, coupled with the contamination of and scarcity of the water systems as affected by the mining operations, the benefits of these CSR activities against the health hazard promoted by the project are unclear. The webpage further informs that the Foundation has assisted in the construction/renovation of Entasopia and Oloika Health Centers.

On the education front, the company boasts of having supported many primary schools in the area in terms of construction of classes, provision of learning and teaching materials and installation of solar systems, among others. With regard to secondary schools, the Foundation lists the construction of a Boarding Secondary School in Magadi division as one of its achievements. This school opened its doors in 2005 and currently has over 400 students. It further states that over 20 students benefit from bursaries annually and are supported for 4 years. On tertiary education, the Foundation provides six scholarships for tertiary/university education for students from the entire wider Kajiado District. However, the amounts spent on this (education program) activity is not stated, and as such, one is left to wonder whether payment of royalties to community members would not realize more benefits.

With regard to the environment, the Foundation ran a program which lists the following objectives: (1) improved agro forestry by planting trees along river banks, homes, and southern part of the lake; (2) to improve environmental conservation and promote the economic livelihood of the community through wildlife based and other eco-tourism enterprises by 2019; (3) to mainstream environmental, climate and mineral concerns into overall planning, implementation, and monitoring of county government and partners, so as to reduce environmental degradation and strengthen the role of environment and natural resources in reducing poverty; (4) to raise real awareness of the importance of environmental matters within national and local political leaders; stressing social and economic importance as well as ecological consequences; and (5) to enhance environmental education, public participation

³See <http://www.magadisodafoundation.org/> - accessed 27/3/18.

and awareness and coordinate other stakeholders in environmental management. Its activities include public awareness campaigns, outreach and education, tree planting, clean-up campaigns, creating awareness of environmental challenges and solutions, promotion of best practices, and dissemination of environmental messages through mass and folk media. The impact of this against the degradation taking place as affected by the mining activity is not clear.

On youth empowerment, the Foundation lists the cultural challenges (the preference of a large number of children and shunning of education) that one is faced with by developing change in the community, indicating that its program envisages to empower the youth into realizing some business opportunities and practice projects in different places of the division to reduce poverty. The nuts and bolts of how this will be achieved are, however, not mentioned.

On its part, Base Titanium, which is mining Titanium in Kenya's coast in Kwale, indicates that it is involved in the following CSR activities; Community infrastructure, Community projects, and livelihood program, community health and provision of academic scholarships⁴. Under community infrastructure, the company lists the following as its activities (as guided by the agreement entered into in the lease agreement): construction of two schools, a dispensary, a social hall and two boreholes at the Mrima Bwiti Host Resettlement Site, and two schools, a borehole and health center at Magaoni, which have been completed. Since the area has several existing health facilities, in agreement with county health authorities, community consultation committees and the Commissioner of Mines, the company has provided a four-wheel drive ambulance to Msambweni Referral Hospital as an alternative to another dispensary in the area. Other activities include assisting the county government with the construction of early childhood development centers, agricultural training facilities, health facilities and water infrastructure; refurbishment of existing schools in Kwale and Mombasa counties to create a better learning environment; upgrading work to improve service delivery at the Kenya Medical Training College at Msambweni; and improving educational facilities for special needs children in both areas. An advanced maternity wing has also been constructed, equipped with specialized surgical theatres. This was done to obviate the need to transfer problem births across the Likoni Ferry (that connects Mombasa Island to the south coast mainland) to Coast General Hospital in Mombasa. The maternity wing constructed by Base Titanium at Likoni Sub-county Hospital was completed in 2017 and includes provision of 18 maternity beds. Under this program, the need for a blood bank facility in the County was identified to address the problem of acquiring blood supplies from Mombasa, which were often delayed, which then adversely impacted on emergency cases. Progress on this front is ongoing.

Under the community and livelihood program, the company has mounted agricultural support programs (on potato, cotton, sorghum, and poultry keeping), and animal husbandry programs. Other projects include: providing life skills training through sport supporting existing community projects such as Village Savings and Loans Association ("VSLA") schemes for volunteer community health workers and enterprise development for youth and women's groups.

⁴See <http://basetitanium.com/community/community-programmes> accessed 27/3/18.

With regard to the community health program, the company has rolled out a program to assist in the expansion of the Kwale and Mombasa Counties Health Departments' Community Strategy Program by providing funding for training and ongoing logistical support. On hospital equipment, long-term plans to upgrade the Msambweni Referral Hospital to a level that will be able to handle almost all emergency and routine medical procedures are underway. The Magaoni Health Center has also been constructed by Base Resources. Base Resources has provided equipment for this facility and has constructed a dispensary at Bwiti in 2012. Community health workers have also been empowered to deal with the emerging bedbug infestation through training in fumigation procedures and provision of fumigation equipment. Under the Prevention of Mother to Child Transmission ("PMTCT") project, the company had by September 2017 enrolled close to 800 HIV positive pregnant mothers into the care, with further effort envisaged to reach 11,000 HIV negative pregnant mothers with preventive messages.

Under the scholarship program, base resources have established a scholarship program to cater for bright but needy students. By December 2017, the company boasts of having supported over 1050 needy local students from Kwale County and Likoni Sub-county who are studying at a variety of institutions across the country. Since 2013 the company has invested 164 million shillings (US\$1.6 million) in providing scholarships. One other community training initiative is in the area of Maritime Course Training. This is promoted as a community initiative geared toward improving livelihoods near the company's ship loading facility at Likoni. Toward this end, base resources donated a fishing boat and fishing equipment to the Likoni Beach Management Unit ("BMU"). It has also facilitated attendance of 50 members of the BMU at the Dar es Salaam Maritime Institute in Tanzania to receive training in fishing and marine safety. The company's investment in this initiative is said to total 14 million shillings (US\$136,000).

On the initial CSR programs pursued by Tiomin (K),⁵ a study found that the various CSR activities fall below the expectations of the local communities, especially when these were compared with the assets they had lost to the project [47]. The now increased CSR activities seem to suggest that lessons from the past have been learned. What remains unclear are the community's sentiments toward these expanded programs. Research of this is necessary as it has been found that at times what is on paper is actually not being substantiated on the ground [36, 37]. This then begs the question: should CSR be legally regulated? The following section examines this conundrum.

6. Legislating corporate social responsibility (CSR) activities

The relevance of CSR in the mining sector is not in doubt ([40], p. 239). However, in spite of this, CSR in Africa largely remains a voluntary undertaking. This is even more evident in the

⁵Tiomin Resources was the leading titanium mining firm in Kwale between 2002 and 2010. It changed its name to Vaaldiam Resources in early 2010. Its operations in Kwale were acquired by Base resources of Australia, who bought this concern (from Vaaldiam) on 30th July, 2010. For the CSR activities pursued by Tiomin, see Tiomin (K)'s document entitled District Compensation and Resettlement Committee (DCRC) [49].

mining sector. It is perhaps because of this that CSR activities in the mining industry have had a questionable reputation for social responsibility ([34], p. 275). The voluntary nature of CSR makes many extractive companies in the mining sector opt to do just enough to appease the host government that it is doing something along these lines. Some scholars have termed this as the practice of obtaining a "social license" to operate. In Africa, South Africa stands out as the only country with a large extractive industry to have an explicit law that regulates CSR activities. This is the Mineral and Petroleum Resource Development Act (MPRDA) backed by the Broad-Based Socio-Economic Charter for the Mining Industry (Mining Charter). These two efforts call upon mining companies to invest in social development and to diversify ownership to historically disadvantaged groups [50]. On the backdrop of colonialism and apartheid, the South African government enacted the law so that CSR can be used as a development tool to address social justice (especially past injustices) and community development [51].

The MPRDA specify the objectives and processes for the Social and Labor Plans (SLPs) that must accompany every mining application. These guidelines form the main regulatory force driving CSR in the South African mining industry. The 2004 Mining Charter demands on the other hand, among other things, 26% ownership of mines by historical disadvantaged South Africans within 10 years. It also enacted a scorecard to monitor company compliance with their SLP requirements. Previous studies have found that existence of regulation has increased the formalization and strategic nature of CSR in South Africa [52]. The studies have also noted that the existence of regulation has led to increased reporting on CSR and the generally increased commitment to CSR. Without a doubt, therefore, regulation of CSR is a good thing.

Other countries also appear to want to follow suit. Kenya is such one country. Previously, mining contributed only 1% to Kenya's Gross Domestic Product (GDP) [53, 54]. The recent discovery of titanium in Kwale, gold deposits in Trans Mara, coal in Eastern province of Kenya, and oil deposits in the Turkana basin in Northern Kenya has now placed Kenya among the great mineral nations in the world. The 2016 Mining Policy⁶ and the new 2016 Mining Act (that replaced the archaic 1940 mining act inherited from the colonial government) seeks to address past and present concerns over problems associated with mining extraction. The mining policy sets out the aspirations of the Kenyan government with regard to mineral development in Kenya. Much of the objectives in mining policy have been translated into law (the enactment of the 2016 Mining Act⁷ is a case in point). In the said Act, regulations resolved the contentious issue of royalty as, under Section 183 (5) royalties are now payable and are distributed as follows: 70% to the National Government; 20% to the County Government; and 10% to the community where the mining operations occur. The new act retained the government rights over minerals and the forceful taking of community land for mineral development. With this proviso retained, it will not be surprising if conflicts over land rights continue, as this has been identified as one of the factors that promote conflict in this sector [36].

⁶Available: http://www.mining.go.ke/images/PUBLISHED_MINING_POLICY_-_Parliament_final_.pdf - accessed 17/4/2018.

⁷Available: <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/MiningAct29of1940.pdf> - accessed 17/4/2018.

The new Act further affirms CSR as a voluntary activity, as it only recommends that companies should engage in CSR activities. It is this loophole that the Local Content Bill of 2018⁸ hopes to seal. Among other things, this bill recommends that application for mining licenses must be accompanied by a comprehensive Local Content Plan (Part IV of the Act), which will address employment and skills development of locals. The plan will include employment and skill development plan, education and training plan of locals, a research and development plan; a technology transfer plan; preference to a local company in the grant of a license or award of a contract with respect to extractive activities, percentage of local equity ownership of extractive industry companies; a financial services plan, and a succession plan for positions not held by Kenyans, among other things. It also suggests a reporting and monitoring framework for each stage of the mining process.

Developing countries present a unique context for CSR strategy, as the role of government is often limited or different from developed countries [55]. The South African and Kenyan case demonstrates that African governments are now flexing their muscles into the realm of CSR. While South Africa already has a CSR law, Kenya has a bill that is very comprehensive in content and one which gives promise to a structured CSR environment in the mining sector.

7. Discussion and conclusion

In the quest for foreign investment, African governments are often accused of bending over backward to accommodate the interest of foreign extractive companies over the interest of its own citizen. In Zambia for instance, the government has succeeded in keeping mining companies happy by meeting their every whim, but in so doing it has been unable to collect a sensible share of revenue or to perform its role as a regulator and protector of the rights of workers and local communities and as a provider of social services [56]. Despite increases in copper prices, poverty in Zambia continues unabated with mining communities being hit the hardest as they have already lost their assets (thereby lost their means for livelihood) through displacement. Similarly, in Kenya, it is argued that the economic crisis allied the state with Tiomin Inc., to acquire mining rights for mining of titanium in Kwale, southern Kenya. In order to attract investment, the Kenyan government offered substantial incentives to the mining company, which limited the potential benefits accruing to the community ([57], p. 8). It is for this reason that mining communities agitate for a share of the profit emanating from the mining ventures. Mining communities clearly face challenges of structured constraints and systemic inequality.

Mining communities expect a certain degree of social services to be provided by the existing mining companies [25]. However, in view of the fact that in much of Africa CSR activities are not legislated, companies are often left at their own device to decide on what CSR programs to run—with often disastrous results. A more participatory approach has been suggested to

⁸ Available: <http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2018/LocalContentBill2018.pdf>- accessed 17/4/2018.

remedy this [48]. However, even with local (and government) participation, it is doubtful that if left on their own, companies will actually mount CSR programs that will benefit local communities. The South African case is a good example of how legislation can lead to good CSR practices. Kenya appears to be heading in this direction going by its recent introduction of the Local Content Bill. The bill is currently undergoing the legislative process. As Carroll's CSR pyramid illustrates, to many companies, CSR comes a distant fourth after economic, legal and ethical responsibilities. Therefore, making CSR a legal requirement will increase its importance in the agenda of mining companies and governments.

As observed earlier, mining conflicts in Africa revolve around five issues; conflict over land ownership, over environmental degradation, over compensation for lost assets, over not having a share in the profits emanating from the mining ventures, and over human rights abuses. Since governments will continue to forcefully take land from local communities for mineral development, it is imperative that CSR activities be taken serious if governments and mining companies are to assuage the disaffection of communities over mining enterprises. This is for the reason that in mining ventures one cannot do without the significant other [25]. It is, therefore, imperative for CSR activities to be legislated. This will be in line with suggestions from other quarters that insist that there should be a firm/consolidated policy and legal basis for CSR [58]. This is perhaps the only way through which CSR can succeed in Africa. For as argued:

"CSR decisions of most foreign firms ...are triggered mainly by legal obligations and anticipated economic gains. By seeing CSR investments as duties rather than morally appropriate discretionary acts, the foreign firms....tend to uphold the barest minimum set of CSR obligations" ([59], p. 531).

Making it a legal requirement will bring CSR to the center of the company agenda. It is, therefore, time to move CSR from rug four in Carroll's CSR pyramid to rug two as a legal obligation. Once that is done, the next step will be for developing countries to develop their own corporate governance models that consider the cultural, political and technological conditions found in each country ([60], p. 14).

Conflict of interest

There is no conflict of interest with regard to this article.

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